



## DOL/OALJ REPORTER

[\*Malpass v. General Electric Co.\*](#), 85-ERA-38 and 39 (ALJ Jan. 24, 1986)

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**U.S. Department of Labor**  
Office of Administrative Law Judges  
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DATE ISSUED: January 14, 1986  
CASE NOS.: 85-ERA-38, 85-ERA-39

In the matter of

JOY MALPASS  
and  
JOHN CLARENCE LEWIS  
Complainants

v.

GENERAL ELECTRIC COMPANY  
Respondent

### RECOMMENDED ORDER OF DISMISSAL

The original complaint in the above-captioned case was filed on 5/23/85 under the Energy and Reorganization Act of 1974 [the Act], as amended, 42 U.S.C. § 5851. Subsequently, amendments to the complaint dated 6/17/85, 7/15/85 and 8/22/85 were filed with the Department of Labor [DOL]. On 8/30/85, the DOL issued its finding that complainants' allegations could not be substantiated. Complainants filed an appeal notice on 9/5/85.

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The undersigned Administrative Law Judge [ALJ] received the file in in this case on Monday, 9/16/85, immediately reviewed it and, on that date, attempted to arrange a conference call with counsel for both parties to discuss a hearing date, however, counsel

for Complainants was unavailable. A conference call with counsel for Complainants and Respondent was accomplished on 9/18/85, during which counsel were put on notice that a hearing would be scheduled for 12/2/85. A Notice of Hearing and Pre-Hearing Order confirming that date was issued on 10/10/85. Among other things, the Order required the parties to make certain pre-hearing submissions by 11/15/85. Respondent complied, but Complainants did not. A copy of the Order is attached hereto as *Appendix A*.

On 10/16/85, Employer served notice of the taking of Complainants' depositions on October 31, 1985 in Wilmington, NC. A copy of the Notice of Deposition was received by the Office of Administrative Law Judges [OALJ] on 10/18/85. Such Notice was timely and in accordance with the provisions of 29 C.F.R. § 18.22.

On the morning of 10/30/85, William W. Sturges, counsel for Employer, notified this office that he had been informed a few minutes earlier by Mozart G. Ratner, counsel for Complainants, that Complainants would not be appearing for the depositions on 10/31/85, and that Mr. Ratner then was in the process of preparing a Motion for a Protective Order, pursuant to 29 C.F.R. § 18.15.

The undersigned held a conference call with both counsel beginning at 11:45 A.M. on 10/30/85, during the course of which Mr. Ratner read the full text of the Motion referred to above, and submitted other argument in support of his position. Mr. Sturges was given an opportunity to respond and to state his reasons why the deposition should proceed as scheduled. Having heard both sides and noting that the granting of a protective order is within the discretion of the ALJ, the undersigned orally denied Complainant's Motion for a Protective Order. An Order Confirming Oral Ruling was issued on 10/30/85, and Complainants were ordered to appear for depositions on 10/31/85. However, Complainants failed to make themselves available for the scheduled depositions.

Respondent filed a Motion for Sanctions on 11/5/85 in which it requested (a) that Complainants be ordered to answer interrogatories served 9/30/85 by 11/15/85, (b) that Complainants' depositions be rescheduled for 11/22/85 and 11/23/85, (c) that Complainants be ordered to comply with the request for production served 10/16/85 by 11/30/85; and (d) that Respondent be awarded costs, expenses and attorney fees against counsel for Complainants and/or

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Complainants because of their willful violation of the court's order that they appear for depositions on 10/31/85. By an Order dated 11/15/85, Complainants were directed to present themselves for the taking of depositions which subsequently were scheduled for 11/22/85 and 11/23/85. Complainants were further advised that their failure to make themselves available for the rescheduled depositions would result in their not being permitted to testify at the oral hearing on 12/2/85. Complainants also were ordered to answer Respondent's interrogatories and to comply with Respondent's previous request for production. Complainant's failed to comply with any part of the Order of 11/15/85.

On 11/5/85 Respondent also filed a Motion to Dismiss and a Motion for Partial Summary Decision. Respondent requested summary judgment on certain issues either because those alleged statutory violations occurred more than 30 days prior to the filing of the complaint or because they were fully litigated previously in *English v. General Electric Co.*, 85-ERA-2. Respondent further requested dismissal of some issues on the ground that the pleadings failed to state a claim under Section 210 of the Act, or that the requirements for filing a complaint pursuant to 29 C.F.R. § 24.3 had not been met. Respondent also moved for the dismissal of the so-called "other" Complainants, i.e., those not specifically named in pleadings submitted on behalf of Malpass and Lewis, because counsel for Complainants does not have authority to bring an action on behalf of employees he does not represent. Respondent argued that counsel did not utilize the joinder provisions of 29 C.F.R. § 18.10, and therefore, he should not be permitted to achieve the same result through a form of fictitious party pleading not contemplated by § 210 of the Act. The Order issued on 11/15/85 provided that Respondent's Motion to Dismiss and Motion for Partial Summary Decision would be held in abeyance and a ruling on it postponed until such time as a final decision is rendered in this case.

Complainants filed a Motion for "Involuntary Dismissal" on 11/7/85,<sup>1</sup> in which they alleged that the order issued by the undersigned on 10/30/85, denying their request for a protective order, was an illegal and unconstitutional interlocutory order which deprives them of a fair trial. They argued that since no direct appeal may be taken from an interlocutory order of an ALJ, an order of dismissal was the only means available to them for obtaining timely review of the denial order. Complainants' Motion for involuntary Dismissal was denied on 11/15/85, the reasons being that Complainants failed to show that any useful purpose would be served by granting such a Motion, that the general policy against interlocutory appeals has as its purpose avoidance of dilatory measures of the kind initiated by Complainants, and that public policy embodied in the governing statute and

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regulations contemplates prompt resolution of the issues raised by the parties.

With respect to the above Motion for Involuntary Dismissal, Complainants filed a Motion for Continuance to Reply to Respondent's Statement dated 11/13/85. However, the Motion was not received by the OALJ until 11/18/85. For lack of good cause shown, Complainant's Motion was denied pursuant to an Order issued on 11/18/85.

Respondent submitted a Motion for an Order to Show Cause to the OALJ on 11/25/85. Action regarding that motion was deferred until after the hearing.

In anticipation of Complainants' appeal of the undersigned's previous denial of their request for a continuance, Respondent filed with the Secretary of Labor a Statement in Opposition to Claimant's Appeal of ALJ Bradley's Denial of Claimant's Motion for a Continuance dated 11/27/85. On 11/29/85 Complainants moved the Secretary for a stay

pending appeal to postpone the hearing scheduled for 12/2/85. Complainants filed a document with the Secretary dated 12/2/85 and titled "Plaintiffs' Emergency Appeal to the Secretary of Labor from Orders of ALJ John C. Bradley Denying Plaintiffs' Motions for Continuance of Trial and Postponement of Discovery and Refusing Plaintiffs' Motion for Involuntary Dismissal".

The Secretary issued an Order Denying Request for Stay Pending Appeal on 12/20/85. Complainant's Motion for Reconsideration of Order Denying Request for Stay Pending Appeal was dated 1/3/86. It does not appear that the Secretary has acted yet on the Emergency Appeal or the Motion for Reconsideration.

The oral hearing was scheduled for 9:00 A.M. on 12/2/85 in Wilmington, NC. Although counsel for Complainants had been aware of the hearing date for 75 days, neither Complainants nor their representative made an appearance at the hearing. The undersigned waited until 9:20 A.M. to commence the proceeding, which lasted approximately 1/2 hour. Appearances were submitted on behalf of Respondent, and the undersigned introduced into evidence copies of the various orders referred to above, supplementing them with a number of informal written "Report of Contact" forms recording calls between counsel for either party and the undersigned's attorney-advisor.

An Order to Show Cause was issued on 12/5/85 giving Complainants until

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12/19/85 to explain their failure to attend the hearing on 12/2/85, to show cause why their complaint under the Act should not be dismissed with prejudice, and to show cause why costs, including reasonable attorney fees, should not be awarded to Respondent for all expenses incurred with respect to this complaint. It was further ordered that Respondent submit a specific listing of all expenses it contends should be assessed against Complainants. Each party was given until 12/27/85 to respond to the other's submissions.

In support of its position that substantial sanctions should be assessed against both Complainants and their counsel, Respondent filed a response to the show cause order on 12/19/85. Following a detailed chronology concerning the procedural posture of this case, as well as the course of conduct of Complainants and their counsel throughout, Respondent argues that such conduct "demonstrates that the action was not brought in good faith, that counsel never made an investigation into the facts, and that *all* of counsel's actions in the case were deliberately designed to frustrate, delay and prevent trial of the case". Respondent further contends that the allegations contained in the complaint in this case are frivolous, some having been previously litigated in *English*, others relating to events that occurred outside the 30 day limitations period and still others failing to state a claim under the Act. Respondent requested the following sanctions:

- (1) \$1,000.00 in fees and expenses to be assessed against each of the complainants for their willful refusal to appear at depositions on 10/31/85 and 11/1/85 and again on 11/22-23/85, and for their willful refusal to respond to any of Respondent's discovery requests;
- (2) \$8,548.46 in fees and expenses to be assessed against Complainants' counsel for advising and causing the willful failure of the Complainants to appear at their scheduled depositions;
- (3) Reimbursement in the amount of \$7,224.22 by Complainant's counsel for Respondent's fees and expenses incurred in appearing at the hearing on 12/2/85;
- (4) \$2,670.00 in fees and expenses to be assessed against Complainants' counsel because of the expense incurred by Respondent in responding to his "frivolous and premature" appeal of an interlocutory order to the Secretary of Labor; and
- (5) Reimbursement by Complainants' counsel for Respondent's expenses and attorney's fees incurred in seeking sanctions, such amount to be specified in its response due 12/27/85.

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Complainants filed Jurisdictional Objections to the Order to Show Cause on 12/23/85.<sup>2</sup> In regard to their failure to attend the hearing on 12/2/85, Complainants contend that the undersigned lacked jurisdiction on 9/18/85 to schedule the hearing and on 11/18/85 to deny their motion for a continuance because Complainant's counsel had informed him of "prior judicial commitments" which would preclude counsels preparation for the 12/2/85 hearing. During the course of the conference call on 9/18/85 counsel for Complainants identified these "prior judicial commitments", not as commitments to appear in Court but rather (a) to prepare a brief on appeal of the *English* case, due 10/15/85; (b) to prepare a reply brief in the *English* case, due 11/15/85; and (c) to catch up on other matters after 11/15/85. Complainants' position is that the granting of their request for a continuance was mandatory under 29 C.F.R. § 18.28(a). Complainants also argue that they were entitled to a "completely unexpurgated" copy of the DOL's final investigation report prior to the commencement of the discovery process and the setting of a hearing date.

As to the dismissal of the complaint, Complainants assert that the undersigned had a mandatory duty under 29 C.F.R. § 24.5 (e)(4)(B) to grant their Motion for Involuntary Dismissal filed 11/7/85. They contend that the denial of their motion was "unlawful, unconstitutional, and beyond an administrative law judge's jurisdiction".

With respect to the possible imposition of sanctions, it is Complainants' position that an ALJ has no authority to impose monetary penalties or sanctions to compel compliance with a lawful order. They argue that such is the case even if it is found that the disobedience was dilatory and groundless.

Respondent filed a document called Respondent's Response to Complainants' Jurisdictional Objections to Order to Show Cause and Respondent's Supplemental Request for Sanctions on 12/2/7/85. Respondent argues that the language of 29 C.F.R. § 18.28(a) is discretionary rather than mandatory and that the ALJ determines whether

"prior judicial commitments or undue hardship or a showing of other good cause" has been made by the moving party. It also points out that Complainants never requested a "dismissal with prejudice".

Respondent further states that 29 C.F.R. Part 24 mandates the time limits for the hearing and prevails unless those limits are waived by the parties. Respondent contends that it waived the time limit until 12/2/85 but not beyond.

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In regard to Complainants' argument that they were entitled to a "completely unexpurgated copy of the final investigation report before a hearing date could be set or the commencement of discovery authorized by the ALJ", Respondent states that no authority or reason has been cited to support such a claim and that none exists.

With respect to the denial of Complainants' request for an involuntary dismissal, Respondent argues that 29 C.F.R. § 24.5(e)(4)(B) does not mandate allowance of the motion, but rather states that an ALJ "may" dismiss a claim. Respondent further contends that Complainants failed to follow the required procedure for a dismissal order set forth in 29 C.F.R. § 24(e)(4), which requires that a show cause order be issued prior to any dismissal order. Respondent points out that Complainants never moved for a show cause order.

As to an ALJ's authority to impose sanctions, Respondent cites *Nolder v. Raymond Kaiser Engineers, Inc.*, 84 ERA 5, in support of its position that an ALJ's recommended decision or dismissal order, under 29 C.F.R. § 24.6 or 24.5 (e)(4) respectively, may contain a recommendation for sanctions.

In addition to the sanctions requested in its initial response to the show cause order on 12/19/85, Respondent asks that the following be assessed against Complainants' counsel:

- (1) \$7,824.00 in fees incurred by Respondent in sanction requests and legal research;
- (2) \$45.00 court reporter fee for trial transcript;
- (3) \$200.00 court reporter fee for Simmons deposition; and
- (4) an additional appropriate assessment considering additional expenses and fees incurred by Respondent in excess of \$50,000.00.

Complainants submitted a Reply to Respondent's Response to ALJ's Show Cause Order on Sanctions dated 12/27/85 and received by the OALJ on 12/31/85. Complainants argue that compliance with the undersigned's orders would have been inconsistent with their claim that the orders were unconstitutional and invalid. They state that "non-compliance with the challenged scheduling and discovery orders, followed by a request for dismissal with prejudice,"<sup>3</sup> is the customary procedure for obtaining immediate review

of such orders". Complainants contend that any delay resulting from their non-compliance is

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"necessary to preserve complainant's [sic] legal and constitutional right immediately to attack the legality of that order on appeal, that "such delay is inherent in the concept of due process", and that since the delay is necessary, it "cannot legally, be condemned as 'dilatory'". Complainants also reiterate their argument that 29 C.F.R. §§ 18.28(a) and 24.5(a) contain mandatory rather than discretionary language.

Complainants also argue that the *Nolder* decision cited by Respondent can be distinguished in that it involved a voluntary dismissal situation. They further take issue with the Secretary's assumption in *Nolder* that because Rule 41 of the Federal Rules of Civil Procedure "authorizes *district courts* to impose financial, cost shifting, conditions on *voluntary* dismissals, the silence of § 210, the APA, and 29 C.F.R. on this subject empowers ALJs and the Secretary to impose conditions similar to those which a federal court may impose under Rule 41." Complainants argue that "absent *statutory* authorization, of which there is none, the Secretary cannot legally clothe ALJs with United States District Court Judge's powers merely by incorporating FRCP 'when applicable'". Complainants interpret 29 C.F.R. § 18.1 to mean that the federal rules may be resorted to lawfully on "mere non-legally prejudicial matters of practice and procedure" where Title 29 is silent, but that "in no case can FRCP serve to vest in an ALJ or the Secretary any substantive or enforcement *power* merely because FRCP acknowledges or bestows such power on District Courts of the United States".

#### The Dismissal Issue

Initially, complainants' jurisdictional objections to the Order to Show Cause of 12/5/85 will be addressed. Complainants argue that the language of 29 C.F.R. § 18.28(a) mandated the granting of their request for a continuance in this matter. Respondent, on the other hand, contends that the decision of whether to grant or deny a party's motion for a continuance lies within the discretion of the ALJ.

The regulatory language in question is as follows:

"§ 18.28 Continuances.

"(a) When granted. Continuances will only by [sic] granted, in cases of prior judicial commitments or undue hardship, or a showing of other good cause."

Clearly, such language does not mandate the granting of a continuance upon the request of a party who claim prior judicial commitments or undue

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hardship. Rather, these are examples of what, in a given circumstance, may be found to be good cause. It remains within the ALJ's discretion to determine whether the situation presented constitutes good cause for granting a continuance. It should be noted that the undersigned interprets "prior judicial commitment" as meaning that another judicial proceeding is scheduled for the same time as the one which a party seeks to have continued. It does not encompass the situation as presented here where Complainants' counsel had a brief due in another case in the same general time period. Moreover, Complainants filed their appeal on 9/5/85, nearly 3 months before the 12/2/85, hearing date, and the only interim "prior judicial commitments" identified by their counsel on 9/18/85 were (a) the *English* case brief, due 10/15/85, and (b) the reply brief in the same case due one month later.<sup>4</sup>

Complainants also contend that the undersigned had a mandatory duty under 29 C.F.R. § 24.5(e)(4)(B) to grant their Motion for an Involuntary Dismissal. § 24.5(e)(4)(B) provides as follows:

"(4) Dismissal for Cause. (i) The administrative law judge *may*, at the request of any party, or on his or her own motion, dismiss a claim

\* \* \*

(B) Upon the failure of the complainant to comply with a lawful order of the administrative law judge. (ii) In any case where a dismissal of a claims, defense, or party is sought, the administrative law judge shall issue an order to show cause why the dismissal should not be granted and afford all parties a reasonable time to respond to such order. After the time for response has expired, the administrative law judge shall take such action as is appropriate to rule on the dismissal, which way include an order dismissing the claim, defense or party. [emphasis added]

The above language certainly does not require that the ALJ dismiss a claim upon the motion of a party, be it the complainant or the respondent. The operative words are "may" and "shall take such action as is appropriate", both indicating discretion -- the part of the ALJ. The only mandate is that a show cause order be issued prior to dismissal.

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Complainants initially moved for an "involuntary dismissal", an ambiguous term lacking any connotation as to whether such a dismissal would be with prejudice or without prejudice. As noted above, the first submission by Complainants to the OALJ referring to a "dismissal with prejudice" was that received 12/31/85 in reply to Respondent's response to the show cause order. Had Complainants at any time moved for a dismissal with prejudice, it certainly would have been granted.

The parties apparently being in agreement at this juncture that this complaint should be addressed with prejudice, and no good cause having been shown for Complainants' failure to appear at the hearing of 12/2/85, the complaint in the above-captioned case shall hereby be dismissed with prejudice.<sup>5</sup>

## The Sanctions Issue

Respondent has clearly established the guidelines for the imposition of sanctions in a case brought in a United States District Court. However, the question of whether an ALJ has authority to recommend sanctions based on non-compliance with an interlocutory order is not so clearcut. Respondent cites the *Nolder* case for the proposition that an ALJ does have such authority. However, in *Nolder* it was held that the ALJ had discretion to condition the dismissal of a complaint *without* prejudice on Complainant's reimbursing Respondent for expenses incurred in connection with the proceedings. The complainant in *Nolder* was given the option of proceeding with the action if she found the conditions too onerous. *Nolder* at 17.

The distinguishable fact patterns in *Nolder* and the present case detracts from Respondent's argument that ALJs have been given authority and discretion to set conditions and impose sanctions in every case they deem it appropriate. However, support for the proposition that ALJs have the authority to recommend sanctions may be derived from considering the *Nolder* decision in conjunction with 29 C.F.R. § 18.29(a), the general power provision which authorizes an ALJ to take such actions as are permitted under the Federal Rules of Civil Procedure.<sup>6</sup> Since both Rule 11 and Rule 37 provide for the assessment of sanctions, an ALJ has authority under the Act to include such sanctions in his recommended decision to the Secretary of Labor. Enforcement of sanctions contained in the final order may be obtained by the Secretary in a U.S. District Court pursuant to 42 U.S.C. § 5851(d) and 29 C.F.R. § 24.8.

The final question to be addressed is whether all or part of Respondent's

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expenses and attorney fees in this litigation should be assessed against Complainants and/or their counsel. Although Complainants' non-compliance with the lawful orders issued by the undersigned is certainly grounds for dismissal of this complaint with prejudice, an overriding public policy is present in this case which militates against sanctioning Complainants and their counsel for conduct that certainly could be termed dilatory and vexatious.

Complainants and Respondent are involved in an industry in which safety regulations must be adhered to and enforced with diligence. Both employees and the community must be protected against unsafe practices in the handling and utilization of radioactive materials. "Whistleblower" statutes are indispensable tools in encouraging and ensuring the maintenance and practice of proper safety procedures. Employees must be assured that they can come forward to expose safety violations and dangerous conditions without the specter of risking serious financial losses. The imposition of sanctions against complainants almost certainly would have a chilling effect on other potential "whistleblowers" at Respondent's Wilmington facility, and, perhaps, elsewhere. The assessment of sanctions against Complainants' counsel could have a similar effect on the

willingness of attorneys to represent such "whistleblowers". It is particularly important to guard against any possible chilling effect in situations such as the present one, where it is indicated that safety violations leading to potentially dangerous conditions have occurred in the past. See *English, supra*. Employees must feel free to come forward should any such violations occur in the future. Therefore, Respondent's Motion for Sanctions is hereby denied.

ORDER

1. The complaint of Joy Malpass, John Clarence Lewis et al., under the Energy and Reorganization Act of 1974, 42 U.S.C. § 5851, is hereby dismissed with prejudice.
2. Respondent's Motion for Sanctions is denied.

JOHN C. BRADLEY  
Administrative Law Judge

JCB/SWC/llk